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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

MAGCO DRILLING INC. et al., Plaintiffs, Cross-defendants and Respondents, v. STEVE NEVILLE et al., Defendants, Cross-complainants and Appellants.	A155907 (Alameda County Super. Ct. No. RG13687945)

This appeal concerns an action between two foundation contractors and their alleged agreements, including those for the sale of construction equipment and a patent, which ran aground. Following a jury trial, the trial court entered judgment awarding Magco Drilling, Inc. (Magco), MCM Enterprises, Inc. (MCM), and Michael Maggio a total of $1,307,883 in compensatory damages, and awarding Substructure Support, Inc. (SSI) and Steve Neville a total of $1,075,000 in compensatory damages.[1] The court decided the parties' respective claims for declaratory relief, finding that the

[1] For the sake of brevity, we will sometimes collectively refer to Magco, MCM, Michael Maggio, and/or Holly Maggio as "the Magco parties," and to SSI and Neville as "the SSI parties." Subsequent references to Michael Maggio and Holly Maggio will use their first names only.

Magco parties owned the equipment at issue, but that Neville retained ownership of the patent. On appeal, the SSI parties challenge all aspects of the judgment except for the declaratory relief judgment declaring Neville the owner of the patent.

First, the SSI parties claim the erroneous pre-trial dismissal of several causes of action in their cross-complaint requires reversal of the money judgments and remand of the matter "for retrial of these claims and [the Magco parties'] related claim of unjust enrichment."

Second, the SSI parties challenge the following evidentiary rulings as erroneous: (1) the court admitted unfounded hearsay job cost reports that negatively impacted the jury's unjust enrichment awards; (2) the court admitted improper expert opinion that prejudicially impacted the jury's verdict on the SSI parties' conversion claims and prejudicially affected the jury's unjust enrichment awards; (3) the court admitted other unfounded expert opinions and refused to exclude the Magco parties' expert; and (4) the court excluded rebuttal and impeachment evidence that likely impacted the unjust enrichment awards.

Third, the SSI parties argue the trial court wrongly refused to provide instructions concerning contracts, sales, the transfer of property and regarding conversion, which impacted the jury's resolution of the conversion claims.

Fourth, the SSI parties claim the jury and the court should have declared SSI the owner of a Delmag drill rig because title "was not passed upon agreement under a contract," and there was no substantial evidence that SSI intended to deliver its title to the Magco parties. Fifth, they argue the trial court wrongly denied motions to compel discovery, which likely impacted the jury's unjust enrichment awards. Sixth, they contend the jury's

unjust enrichment award is unsupported by substantial evidence. Finally, they argue the jury's unjust enrichment award and the declaratory relief granted by the trial court permit double recovery.

We reverse in part and affirm in part.

FACTUAL AND PROCEDURAL BACKGROUND

The following is a brief summary of facts taken from the trial court's statement of decision and the evidence introduced at trial.

At all times relevant in this case, Magco operated as a foundation contractor, and MCM was its holding company. Michael and Holly controlled and operated both companies as a single business. Michael oversaw operations, while Holly performed administrative work. SSI was also a foundation contractor owned and operated by Neville.

In the mid-2000's, Neville developed a method for installing full displacement pile foundations using a special drill tip attached to a steel pipe to screw the pile into the ground, which he called "torque down pile" (TDP). Neville testified that he filed a provisional patent application for this technology in 2005. By February 2011, the patent still had not issued, and SSI was struggling financially. SSI had two pending jobs it could not begin due to lack of funds.

Neville met with Michael in late-February 2011, and the two negotiated a deal that included, among other things, the sale of SSI's equipment—including a Delmag drill rig, a Cat excavator, and a forklift—and Neville's TDP technology (and pending patent) for $1,500,000. It also addressed Magco's work on construction projects with SSI, a salary payment to Neville, and profit sharing on projects utilizing TDP technology. Michael testified he and Neville shook hands, and he believed the deal was complete

that day. Neville indicated they did not reach a complete agreement at that time.

Nevertheless, the parties began to carry out aspects of the deal. For instance, with Magco covering expenses, SSI began work on its stalled jobs. Michael testified he took possession of SSI's equipment, including the drill rig, excavator, and forklift, around March 1, 2011. Evidence at trial showed that the Magco parties paid SSI and Neville substantial sums and paid off amounts owed on the excavator and the forklift, which Michael believed went towards the deal. Michael also paid over $58,000 in attorney fees to Neville's patent attorney, and the patent issued in March 2011. The parties worked on numerous construction projects together.

While working together, Michael tried to memorialize the deal he and Neville shook hands on. In 2011 and 2012, several written draft agreements circulated between the parties, which stated: "Upon execution by all parties of counterparts of this agreement, there will be a binding and enforceable contract formed between the parties." No one ever signed these drafts. In February 2012, faced with an opportunity to sell TDP tips to a third party, Michael and Neville did sign a letter of intent setting out some terms for selling the TDP tips, such as how profits would be split between Neville and Michael. This letter of intent stated Neville was the sole owner of the TDP patent. After executing this document, the parties continued to exchange draft agreements.

The trial evidence showed that by early March 2013, the parties had not executed a written agreement, and Neville told the Maggios he wanted to wind up their dealings. After learning this, Holly cancelled a check en route to pay rent on SSI's office, and Magco fired SSI employees they had hired.

Magco retained possession and claimed ownership of the equipment it obtained from SSI, such as the drill rig, excavator, and forklift.

In March 2013, Magco, MCM, and Michael sued Neville and SSI. In turn, Neville and SSI filed a cross-complaint against Magco, MCM, Michael, and Holly. The trial court sustained a demurrer to the Magco parties' breach of oral contract and related accounting causes of action. The court, acting sua sponte, later dismissed numerous causes of action in the operative cross-complaint of the SSI parties. The following claims proceeded to trial: the Magco parties' causes of action for fraud, unjust enrichment, and declaratory relief; and the SSI parties' causes of action for conversion, unjust enrichment, and declaratory relief.[2]

At trial, the jury returned special verdicts rejecting the Magco parties' fraud claim. But, as to their unjust enrichment claim, the jury found that Magco, Michael, or MCM conferred benefits on the SSI parties in the form of money, labor, and/or materials; that the SSI parties knew about and voluntarily accepted and retained those benefits; that it would be unjust for the SSI parties to keep those benefits; and that the SSI parties damaged Magco, Michael, and/or MCM in the amount of $1,307,883. The jury rejected the SSI parties' claims for conversion, finding SSI did not own the allegedly converted property. The jury also rejected the SSI parties' unjust enrichment claim as to Holly. But regarding the SSI parties' unjust enrichment claim as to Magco, Michael, and MCM, the jury found that the SSI parties conferred benefits on Magco, MCM, and Michael in the form of money, labor, or materials; that Magco, Michael, and MCM knew about and voluntarily accepted and retained those benefits; that it would be unjust for Magco,

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[2] See *post*, footnote 3.

Michael, and MCM to keep those benefits; and that Magco, Michael, and MCM caused the SSI parties damages in the amount of $1,075,000.

In a written statement of decision, the trial court addressed the parties' claims for declaratory relief. The court declared the Magco parties the owners of the equipment at issue. At the same time, the court found Neville retained ownership of the TDP patent, but ordered the SSI parties to reimburse $58,851 that the Magco parties paid to the SSI parties' patent attorney. The SSI parties appealed.

DISCUSSION

A. Dismissal of the SSI Parties' Causes of Action

The SSI parties argue the trial court erred in dismissing the first, second, third, eighth, and ninth causes of action in their operative cross-complaint. We agree, in part.

1. Additional Background

(a) The Complaint

The Magco parties' operative second amended complaint (the Magco complaint) generally alleged that around March 2011, Neville and Michael met at Magco's headquarters and shook hands on three severable oral agreements which SSI and Neville ultimately breached. The first was an agreement for MCM to purchase SSI's equipment. The second was an agreement for Michael to purchase Neville's TDP technology and pending patent. The third was an employment agreement between Magco and Neville, including terms such as Magco paying Neville a salary. The parties also allegedly agreed to other provisions, including working together on projects using TDP technology and to split profits. The Magco parties' first cause of action for breach of oral contract alleged the SSI parties breached the oral agreement to sell Michael the TDP patent (but did not allege breach

of the other two oral agreements, such as the alleged agreement for the parties to work together and split profits). The fourth cause of action sought an accounting related to the breach of the oral contract regarding the assignment of the patent rights. The Magco parties also alleged causes of action for fraud and unjust enrichment, and sought to have Michael declared the owner of the patent.

(b) The Cross-Complaint

The SSI parties' first amended cross-complaint (the SSI cross-complaint) alleged as its first cause of action breach of an oral and implied joint venture agreement. The SSI parties claimed that the parties entered into the oral and implied agreement to perform projects together, and that the Magco parties failed to perform, e.g., by not sharing profits, not paying for expenses the SSI parties incurred, and not providing accountings. The second cause of action alleged the Magco parties breached their fiduciary duties regarding the joint venture, and the third cause of action sought an accounting to determine liability for these breaches.

The fourth and fifth causes of action alleged "conversion and trespass to chattel" of SSI's Delmag drill rig and construction equipment and materials. (Capitalization omitted.) The seventh cause of action was labeled "quantum meruit (restitution) (unjust enrichment)" for "everything of value provided to Magco," including, inter alia, equipment, labor, goodwill, and expertise.[3] (Capitalization omitted.)

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[3] Despite the alternative labeling in the cross-complaint, the SSI parties refer to their fourth and fifth causes of action as claims for conversion, and their seventh cause of action as a claim for unjust enrichment. As such, we refer to these claims as claims for conversion and unjust enrichment.

The eighth cause of action alleged breach of a contract entered into in February 2012 regarding the sale of TDP tips to third parties. The ninth cause of action alleged a breach of fiduciary duties regarding that agreement.

Finally, the SSI parties sought declaratory relief concerning the ownership of equipment and materials in their sixth cause of action and the ownership of the TDP technology in their tenth cause of action.

(c) The Demurrer to the Complaint, and Dismissal of Causes of Action in the Cross-Complaint

In January 2018, the trial court sustained, in part and without leave to amend, the SSI parties' demurrer to the Magco complaint. Specifically, the court sustained the demurrer to the first cause of action for breach of the oral contract to sell the TDP technology and patent and the related fourth cause of action for an accounting. The court indicated the allegation that the parties agreed on definite terms to three oral contracts was inconsistent with the allegation in their original complaint that there was a single oral agreement. "[M]ore significantly," the court remarked, the allegation the parties agreed on definite terms to three separate oral agreements was contradicted by a statement in the Magco parties' draft written agreement—which was attached to their complaint—expressly reciting that the "agreement would be 'binding and enforceable' upon the contemplated execution of the agreement by all parties." The court overruled the SSI parties' demurrer as to the Magco parties' other causes of action.

At a later hearing on February 20, 2018, the court announced, sua sponte, that none of the parties' contractual claims—including those of the SSI parties in their cross-complaint—would proceed to trial. In the court's words, "any claims of contract are out, given the rulings on the demurrer . . . that there was no agreement slash contract." The court indicated this ruling impacted the SSI parties' first cause of action for breach of an oral and

implied joint venture agreement; their related second and third causes of action for breach of fiduciary duties and for an accounting; and their eighth and ninth causes of action for breach of a written agreement to sell TDP tips to third parties and breach of related fiduciary duties.

Immediately following the court's announcements, counsel for the SSI parties stated: "[B]ased upon the Court's ruling that there's no contract, in that situation we will not go forward on our own contract claims. [¶] . . .[¶]. . . [¶]. . . [¶]. . . . [But] I believe that the breach of fiduciary duty regarding joint venture and the breach of fiduciary duty causes of action remain, and they are not affected by rulings on the contract." Throughout the hearing, the SSI parties argued that their cause of action for breach of joint venture duties "is a separate cause of action from breach of contract" and that "what happened with the joint venture, what the share of profits are, and how to distribute those" should be litigated. The Magco parties disagreed, essentially contending that any fiduciary relationship depended on the oral agreements between the parties, and that "if there is no oral agreement, there's no joint venture." The court indicated it did not believe the SSI parties were entitled to raise their claim for breach of fiduciary duty regarding the joint venture, stating: "I think it is fundamentally the allegation that it was premised on some type of agreement." The court, however, said it would allow the parties to submit additional briefing and would issue a ruling on February 22.

The SSI parties filed a brief dated February 21, 2018, in which they agreed to dismiss their first cause of action for breach of an oral and implied joint venture agreement based on the demurrer ruling and "the court's statements that the parties did not enter into an enforceable contract for the sale of assets and technology." But the SSI parties objected to the dismissal

of their second and third causes of action, arguing those claims survived because they did not depend on the existence or enforceability of a contract. The SSI parties argued the court's demurrer ruling did not "implicate or forestall" the SSI parties' second cause of action for breach of fiduciary duties regarding the joint venture. The SSI parties contended the court was effectively and improperly granting summary judgment, they had not been given reasonable notice of the legal or factual grounds for such an order, and there was "no evidence or legal principal establishing that the [second cause of action] does not state sufficient facts to state a claim for breach of fiduciary duty." The SSI parties also objected to dismissal of their eighth and ninth causes of action, arguing those claims arose from a February 2012 agreement distinct from agreements concerning joint performance of projects and sale of assets.

On February 22, 2018, the trial court dismissed the SSI parties' second and third causes of action, again tersely explaining their claim for breach of fiduciary duties was "tied to the existence of agreement [sic] between the parties." The SSI parties asked the court to clarify its reasoning and order, but the court just reiterated that the SSI parties' second cause of action was going to be dismissed. The court also dismissed the SSI parties' eighth and ninth causes of action because they were "tied up with the issue of the patent" and because of "exclusive Federal patent jurisdiction."

2. Analysis

(a) The First Cause of Action (Breach of Oral and Implied Joint Venture Agreement)

The SSI parties contend the trial court erred in dismissing its first cause of action for breach of an oral and implied joint venture agreement. We agree with the Magco parties that the SSI parties' voluntary acquiescence to the dismissal precludes them from complaining about it on appeal.

"One who by his conduct accepts a ruling of the court under circumstances amounting to acquiescence therein, may not complain of it on appeal." (*Allin v. International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators* (1952) 113 Cal.App.2d 135, 138.) Here, the record establishes that the SSI parties, in their February 21, 2018 brief, explicitly agreed to dismiss their first cause of action based on the court's demurrer ruling and related statements. The SSI parties reiterated this in a later brief regarding jury instructions. On this record, we conclude the SSI parties are barred from challenging the dismissal of their first cause of action.

(b) The Second and Third Causes of Action (Breach of Fiduciary Duties and Accounting)

Next, the SSI parties argue the trial court erred in dismissing their second cause of action for breach of fiduciary duties regarding their joint venture, and their related third cause of action for an accounting to address the Magco parties' liabilities.

The SSI parties contend the court's order was tantamount to an order for judgment on the pleadings because the court dismissed the claims without taking evidence. We agree. "[A]n 'objection to all evidence' is essentially the same as a general demurrer or motion for judgment on the pleadings seeking to end the trial without the introduction of evidence." (*Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 26 (*Edwards*).) Here, the court indicated its order dismissing the second and third causes of action was based on its decision to sustain the demurrer to the Magco parties' breach of oral contract claim, which it characterized as a ruling that "there was no agreement slash contract." In taking this action, the court did not indicate it was relying on anything other than the pleadings, e.g., evidence obtained

during discovery. We thus review the order as we would an order granting judgment on the pleadings.

A motion for judgment on the pleadings "accept[s] as true all material factual allegations of the challenged pleading, unless contrary to law or to facts of which a court may take judicial notice. The sole issue is whether the complaint, as it stands, states a cause of action as a matter of law." (*Edwards*, *supra*, 53 Cal.App.4th at p. 27.) We undertake our review de novo. (*Burnett v. Chimney Sweep* (2004) 123 Cal.App.4th 1057, 1064–1065.)

One element of the cause of action for breach of fiduciary duty is the existence of a fiduciary relationship. (*Knox v. Dean* (2012) 205 Cal.App.4th 417, 432.) A joint venture is an "undertaking by two or more persons jointly to carry out a single business enterprise for profit" (*Nelson v. Abraham* (1947) 29 Cal.2d 745, 749) and is a type of relationship upon which the law imposes fiduciary duties (*Cleveland v. Johnson* (2012) 209 Cal.App.4th 1315, 1339). A joint venture may be oral or implied by conduct (*Nelson*, at pp. 749–750), and the existence of a joint venture relationship "is a question of fact, depending on the intention of the parties" (*Pellegrini v. Weiss* (2008) 165 Cal.App.4th 515, 525). Meanwhile, "[a] cause of action for an accounting requires a showing that a relationship exists between the plaintiff and defendant that requires an accounting, and that some balance is due the plaintiff that can only be ascertained by an accounting." (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 179.) "[A] fiduciary relationship between the parties is not required to state a cause of action for accounting." (*Ibid.*)

Here, the SSI cross-complaint states a cause of action for breach of fiduciary duties regarding a joint venture. Under the heading of their second cause of action, the SSI parties alleged that the parties entered an "oral and implied joint venture" in January to April 2011 to perform construction

projects and share profits, and that they engaged in construction projects together with mutual control over the enterprise from March 2011 to March 2013. The SSI parties further alleged that the Magco parties breached their fiduciary duties during the time they worked on projects together and during the winding up process, and that an accounting was necessary to calculate the Magco parties' liabilities.

The Magco parties do not argue the SSI cross-complaint fails to state a cause of action for breach of fiduciary duty or an accounting. Instead, they attempt to defend the court's dismissal of those claims by equating its order to a nonsuit. In sum, the Magco parties contend that: (1) the second and third causes of action for breach of fiduciary duties and an accounting depended on the existence of the joint venture agreement alleged in the first cause of action, because the alleged fiduciary relationship was created by that agreement; (2) the SSI parties' dismissal of their first cause of action operated as a concession that no joint venture agreement had been reached based on the handshake deal; and (3) because there was no such final, enforceable joint venture agreement, the SSI parties' second and third causes of action were subject to dismissal as a matter of law, and the court did not err in granting a functional nonsuit.

Initially, we note that whether the trial court's dismissal order is reasonably viewed as a nonsuit—a procedure that ends a case typically after the presentation of evidence (Code Civ. Proc., § 581c)[4]—is highly questionable. The Magco parties appear to contend that the SSI parties' agreement to dismiss their first cause of action amounted to evidence that the court relied on in making its ruling. That contention, however, is at odds

[4] All further statutory references are to the Code of Civil Procedure unless otherwise specified.

with the circumstance that the court had announced, sua sponte, that it planned to dismiss all the subject claims based on its prior ruling on the demurrer. As indicated, that announcement preceded the SSI parties' agreement to the dismissal, which they made in their February 21, 2018 brief.[5]

In any event, the question is whether, as a matter of law, the SSI parties could not establish the existence of a fiduciary relationship as alleged. On this score, we observe that, aside from the cross-complaint's allegations that the parties reached an "agreement" to operate as a joint venture, the SSI parties additionally alleged that the parties actually did work together from March 2011 to March 2013, bidding on jobs, paying for each other's expenses, and controlling the performance of projects together. Thus, while the SSI parties agreed to voluntarily dismiss their first cause of action, they never conceded the parties owed each other no fiduciary duties or had no fiduciary relationship.

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[5] Had the Magco parties waited until the close of evidence at trial to move for nonsuit, it is doubtful a nonsuit would have been appropriate. "A trial court may grant a nonsuit only when, disregarding conflicting evidence, viewing the record in the light most favorable to the plaintiff and indulging in every legitimate inference which may be drawn from the evidence, it determines there is *no* substantial evidence to support a judgment in the plaintiff's favor." (*Edwards*, *supra*, 53 Cal.App.4th at p. 28.)

Here, the trial evidence supported that the parties intended to and did engage in a joint venture, undertaking numerous joint construction projects using TDP technology from 2011 to 2013 for shared profit. The trial court itself recognized the parties operated as a joint venture, asserting in its statement of decision addressing the parties' causes of action for declaratory relief that "[the Magco parties] and [the SSI parties] formed a joint venture in February[] 2011 to perform work together." Toward the end of trial, when discussing instructions, the court also said: "My view of this case is that this started out as a joint venture." The Magco parties admitted as much when litigating discovery matters.

Instead, during the debate about the survival of the second cause of action, the SSI parties consistently maintained that they in fact operated as a joint venture giving rise to fiduciary duties. Specifically, they argued their cause of action for breach of fiduciary duties regarding the joint venture was not dependent on the existence or enforceability of a contract, and so their cause of action was unaffected by the court's demurrer ruling dismissing the Magco parties' breach of oral contract cause of action. On this point, there is case law recognizing that a joint venture may be implied by conduct. (See, e.g., *Boyd v. Bevilacqua* (1966) 247 Cal.App.2d 272, 285 (*Boyd*) [" 'The law requires little formality in the creation of a joint venture and the agreement is not invalid because it may be indefinite with respect to its details.' "]; *Nelson v. Abraham*, *supra*, 29 Cal.2d at pp. 749–750 [a joint venture "may be assumed as a reasonable deduction from the acts and declarations of the parties"]; *Universal Sales Corp. v. California Press Mfg. Co.* (1942) 20 Cal.2d 751, 765 [a joint venture may be implied by conduct , which "may speak above the expressed declarations of the parties to the contrary"].) On this record, it is unreasonable to view the SSI parties' agreement to dismiss their first cause of action as a concession that they could not establish the existence of a fiduciary relationship.[6]

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[6] Likewise, the SSI parties are not foreclosed from establishing a fiduciary relationship based on the parties' conduct in operating jointly from 2011 to 2013, simply because they concurred in the court's statements, made after its demurrer ruling, that there was "no agreement slash contract." The demurrer ruling specifically concerned the Magco parties' allegations that a contract was formed when the parties met at Magco's headquarters in February 2011 and shook hands on a purported deal for the sale of the TDP patent. Considered in context, the SSI parties could reasonably have understood the court's subsequent "no agreement slash contract" statement as reflecting its determination that no enforceable agreement or contract was formed during the parties' handshake dealings in February 2011.

Ultimately, we cannot conclude the Magco parties were entitled to judgment as a matter of law on the SSI parties' second and third causes of action. We now consider whether this error requires reversal. The Magco parties insist the error was harmless because the breach of fiduciary duty and accounting claims sought the same recovery and relief that the SSI parties sought in their other causes of action. But neither the Magco parties' record citations nor their reliance on *Villano v. Waterman Convalescent Hospital, Inc.* (2010) 181 Cal.App.4th 1189 supports their position. Indeed, the recovery at issue for the SSI parties' unjust enrichment claim was limited to the value of the "equipment, labor, material, payments, and contracts" provided to the Magco parties. Because the potential recovery for this and the other causes of action would not have provided the SSI parties full relief for the alleged breach of joint venture duties,[7] the error was prejudicial and requires reversal. (*Deeter v. Angus* (1986) 179 Cal.App.3d 241, 251 (*Deeter*); cf. *Gordon v. Nissan Motor Co., Ltd.* (2009) 170 Cal.App.4th 1103, 1115.)

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[7] The SSI cross-complaint alleged the Magco parties breached their fiduciary duties in numerous ways. For example, the Magco parties allegedly breached their fiduciary duty by usurping projects in progress; refusing to provide information or accountings regarding those projects; continuing to perform jointly bid on projects using the SSI parties' goodwill and trade names; and stopping payment for a rent check on SSI's office. The SSI parties sought to recover damages for these breaches, including a share of profits for all projects bid, performed, or created under the joint venture, and recovery for damage to the SSI parties' goodwill with vendors and contractors. (See *Everest Investors 8 v. McNeil Partners* (2003);/ 114 Cal.App.4th 411, 424 ["A partner's fiduciary duty extends to the dissolution and liquidation of partnership affairs"]; see also *Boyd*, *supra*, 247 Cal.App.2d at p. 288 ["The rights and liabilities of joint adventurers, as between themselves, are governed by the same rules which apply to partnerships"].) Indeed, when we consider the unjust enrichment instructions that were given to the jury, there appears no dispute those instructions would not have permitted recovery for all the alleged fiduciary breaches.

(c) The Eighth and Ninth Causes of Action (Breach of Contract and Fiduciary Duty Claims Pertaining to Sale of TDP Tips to Third Parties)

The SSI parties' eighth cause of action alleged breach of contract regarding the sale of TDP tips to third parties and their ninth cause of action alleged a related breach of fiduciary duties. The trial court dismissed these causes of action because of "exclusive Federal patent jurisdiction." The SSI parties argue this was error because these were contract and tort claims that did not depend upon application of patent law.

We review this issue de novo. (*Guardianship of Ariana K.* (2004) 120 Cal.App.4th 690, 701.) Under section 1338(a) of title 28 of the United States Code ("section 1338(a)"), federal district courts have exclusive original jurisdiction over civil actions arising from laws relating to patents. (*Applera Corp. v. MP Biomedicals, LLC* (2009) 173 Cal.App.4th 769, 781.) That said, section 1338(a) jurisdiction "extend[s] only to those cases in which a well-pleaded complaint establishes either [(1)] that federal patent law creates the cause of action or [(2)] that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims." (*Christianson v. Colt Industries Operating Corp.* (1988) 486 U.S. 800, 808–809.)

"Given that the 'well-pleaded complaint' test looks only at the plaintiff's pleadings to determine 'the plaintiff's right to relief,' excluded from consideration is ' " 'anything alleged [by the plaintiff] in anticipation or avoidance of defenses which it is thought the defendant may interpose.' " ' " (*Caldera Pharmaceuticals, Inc. v. Regents of University of California* (2012) 205 Cal.App.4th 338, 355.) "Because the critical perspective is that of the plaintiff, it . . . follows that a *defendant* cannot create federal jurisdiction by setting up a defense or counterclaim that is based on patent law." (*Id.* at

p. 355, fn. 14; *Holiday Matinee, Inc. v. Rambus, Inc.* (2004) 118 Cal.App.4th 1413, 1423 [" 'a case raising a federal patent-law defense does not, for that reason alone, "arise under" patent law' "].)

The SSI cross-complaint contains no causes of action created by federal patent law, and the Magco parties do not argue otherwise. Instead, the Magco parties contend the SSI parties' right to relief depends on resolution of a substantial question of federal patent law. This is so, they claim, because during discovery, the SSI parties accused the Magco parties of using Neville's patented technology without his authorization. The Magco parties denied this accusation by claiming they used a new technology developed by Michael and not covered by Neville's patent. The Magco parties assert: "Given that defense, the trial court was correct in concluding that a determination of whether products sold by the Magco Parties constituted TDP tips that were subject to the parties' alleged contract for the sale of TDP tips would require construction of the claims within the [Neville's] Patent to determine whether those products were covered by the patent's claims."

This reasoning is difficult to follow. The Magco parties fail to explain how the parties' dispute over the Magco parties' alleged misuse of TDP technology or some other technology could be used to defend against claims for breach of a contract to sell the TDP tips designed by Neville and breach of fiduciary duties related to that contract. And because determination of federal jurisdiction under section 1338(a) focuses on the plaintiff's pleading, the defenses urged by the Magco parties, standing alone, do not give rise to exclusive federal jurisdiction. Notably, the Magco parties set forth no developed argument with authority supporting deviation from the case law on this point. Instead, they rely exclusively on *Medtronic, Inc. v. Mirowski*

Family Ventures, LLC (2014) 571 U.S. 191, but fail to explain how it aids them.

The Magco parties also argue these causes of action were correctly dismissed on a ground not relied upon by the trial court. (See *Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 880, fn. 10.) Specifically, they assert that the letter of intent the parties signed in February 2012 was the alleged basis for these causes of action, and contend that document was not an enforceable contract as a matter of law because it was nothing more than an agreement for future negotiations. We are unpersuaded.

Like the dismissal of the second and third causes of action, the court did not appear to base its dismissal of the eighth and ninth causes of action on any evidence. As such, again, the decision was tantamount to a grant of judgment on the pleadings. (*Edwards*, *supra*, 53 Cal.App.4th at pp. 26–27.) Applying the previously mentioned rules to this situation, we may not affirm the "judgment" by looking at evidence outside of the pleadings. Yet, this is what the Magco parties advocate by asking us to look at the letter of intent—which was not part of the SSI cross-complaint—to decide it was not a valid contract. We decline to do so.[8] For the same reasons, we also reject the Magco parties' contention—raised in a footnote—that the court properly dismissed the eighth and ninth causes of action as to Magco, MCM, and Holly because they were not parties to the letter of intent. The Magco parties offer

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[8] In reaching this conclusion, we further note the SSI cross-complaint does not actually identify the letter of intent as the sole source of the agreement giving rise to the breach of contract cause of action. Even if it did, the Magco parties offer no basis for deeming the letter of intent an invalid contract based on the pleadings alone or matters judicially noticeable. Finally, we take a moment to note that our decision on this issue does not preclude the Magco parties from filing whatever dispositive motions they think are appropriate on remand.

no argument that, on the face of the cross-complaint, the eighth and ninth causes of action cannot be maintained against Magco, MCM, or Holly as a matter of law.

We conclude the eighth and ninth causes of action were improperly dismissed based on a perceived lack of subject matter jurisdiction. This error requires reversal because the SSI parties were denied an opportunity to prove their claims at trial. (*Deeter*, *supra*, 179 Cal.App.3d at p. 251.)

B. Evidentiary Rulings

The SSI parties raise numerous claims concerning the admission of evidence at trial. We review a trial court's evidentiary rulings for abuse of discretion. (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 281.)

1. The Magco Parties' Job Cost Reports

At trial, the Magco parties introduced 14 job cost reports (trial exhibits 170 through 184) that, in short, showed profits and expenses on joint projects performed by the parties. The exhibits were introduced through Holly, who testified earlier in the trial that she did bookkeeping for Magco and MCM and kept track of expenses, costs and wires that might be related to the alleged handshake deal. Holly identified the exhibits and testified she prepared them. She provided details about how they were prepared, and indicated they were all prepared in the same fashion during the ordinary course of business.

The SSI parties now argue the trial court should have excluded these job cost reports as inadmissible hearsay. Characterizing the reports as untrustworthy and having been created years after the recorded events happened in order "to set forth [the Magco parties'] position on active disputes and negotiations," the SSI parties contend the Magco parties did not establish the foundation for the business records exception (Evid. Code, § 1271). (Italics omitted.) They further claim the reports contained

"additional levels of hearsay and opinion." Erroneous admission of the reports, they claim, negatively impacted the jury's unjust enrichment awards and requires reversal of the money judgment. The Magco parties counter that the SSI parties waived their argument by failing to properly object in the proceedings below. We agree with the Magco parties.

Evidence Code section 353, subdivision (a), requires "an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make *clear the specific ground of the objection* or motion." (Italics added.) Where "the proffered evidence is allegedly imperfect because of the lack of preliminary proof, which might or might not have been supplied by the party offering such evidence, the objection *must be specific and it must point out the alleged defect*. If this is not done, the objection cannot be urged on appeal." (*People v. Tolmachoff* (1943) 58 Cal.App.2d 815, 826 (*Tolmachoff*), italics added; see *People v. Moore* (1970) 13 Cal.App.3d 424, 434, fn. 8 [objection based on lack of foundation "must point out specifically in what respect the foundation is deficient"]; see, e.g., *People v. Modell* (1956) 143 Cal.App.2d 724, 729–731; *People v. Owens* (1899) 123 Cal. 482, 490.)

People v. Dorsey (1974) 43 Cal.App.3d 953 (*Dorsey*) is on point. In *Dorsey*, the defendant objected to testimony about the contents of bank records on the ground the testimony would be "hearsay." (*Id*. at p. 960.) The prosecutor then established that the records were kept by the bank in the regular course of business and that the witness, Putnam, was the bank's custodian of records. (*Ibid.*) "Over a continuing hearsay objection because of 'no foundation,' the trial court permitted Putnam to testify from the records." (*Ibid.*) On appeal, the defendant argued "no proper foundation was laid as required under the business records exception to the hearsay rule." (*Id.* at pp. 959–960.) The Court of Appeal, however, found the defendant had waived

the argument by not clearly objecting on that specific ground. (*Id.* at p. 960.) In particular, the court noted the only apparent defect in establishing the foundation for the exception was the custodian's failure to testify about the mode and time of preparation of the records, which the prosecutor could have remedied had the defense raised a specific objection. (*Ibid.*)

Here, the SSI parties objected to exhibits 170, 171, 173, and 174 as "hearsay", but they did not make hearsay objections to all of the job cost reports. For exhibit 172, the SSI parties simply stated "objection." For exhibit 175, the SSI parties stated "[c]alls for speculation and lack of foundation", and then with exhibit 176, the SSI parties' objection was "[s]ame objection." Similarly, for exhibits 177, 178, and 179, the SSI parties objected by saying, "Same objections," or "Same as other job cost reports." Then for exhibits 180 through 184, the Magco parties stipulated to their admission "subject to [the SSI parties'] objection" without specifying any particular objection. These generic objections and references to prior objections were not clear and specific hearsay objections. (Evid. Code, § 353, subd. (a).)

"A trial judge has broad discretion in admitting business records under Evidence Code section 1271, and it has been held that the foundation requirements may be inferred from the circumstances. Indeed, it is presumed in the preparation of the records not only that the regular course of business is followed but that the books and papers of the business truly reflect the facts set forth in the records brought to court." (*Dorsey*, *supra*, 43 Cal.App.3d at p. 961.) In the proceedings below, Holly provided foundational testimony regarding applicability of the business records exception. We note, however, that the SSI parties previously failed to raise the specific

arguments they raise now about why the exhibits do not qualify for application of the business records exception.[9]

As for the SSI parties' appellate claim that the job cost reports contained "additional levels of hearsay and opinion", again, they omitted to make clear and specific objections on such grounds below.

The SSI parties contend, without citation to authority, that their "hearsay" objection was sufficiently specific. As indicated, however, such contention appears squarely contradicted by *Dorsey* and the aforementioned cases requiring specificity for foundational objections.

The SSI parties also claim they preserved these issues by objecting before trial in motions in limine. We are unpersuaded. "[A] motion *in limine* to exclude evidence is a sufficient manifestation of objection to protect the record on appeal when it satisfies the basic requirements of Evidence Code section 353, i.e.: (1) a specific legal ground for exclusion is advanced and subsequently raised on appeal; (2) the motion is directed to a particular, identifiable body of evidence; and (3) the motion is made at a time before or during trial when the trial judge can determine the evidentiary question in its appropriate context." (*People v. Morris* (1991) 53 Cal.3d 152, 190

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[9] During oral argument, counsel for the SSI parties suggested for the first time that their objections were sufficient because the trial court prohibited "speaking objections." But this argument comes too late. (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1185 [" 'We will not consider an issue not mentioned in the briefs and raised for the first time at oral argument.' "].) In any event, there is no indication the SSI parties objected to any such perceived prohibition on speaking objections in the proceedings below. We also disagree with the suggestion that a court's prohibition against speaking objections releases a party from the requirements of case law and Evidence Code section 353, subdivision (a), concerning the specificity of objections.

(*Morris*).) Our review of the identified motions in limine discloses that none satisfies these criteria for preserving claims on appeal.

Also in their reply brief, the SSI parties for the first time contend that the Magco parties did not articulate their reliance on the business records exception, that the SSI parties were not required to refute an exception before it was raised, and that it was the Magco parties' burden to lay the proper foundation for the business records exception. We reject this. The Magco parties clearly were relying on the business records exception to admit the job cost reports, as they asked Holly foundational questions relevant to that exception. (Evid. Code, § 1271.) The SSI parties do not claim their unawareness that the business records exception was at play, nor do they show their ignorance would excuse noncompliance with Evidence Code section 353 and the decisional authority that requires specificity of objections. Regardless of who carried the burden to lay the foundation for the hearsay exception, it was the SSI parties' responsibility to preserve their claim for appellate review by ensuring the record contained a clear and specific objection. (Evid. Code, § 353, subd. (a); *Dorsey*, *supra*, 43 Cal.App.3d at pp. 959–960; *Tolmachoff*, *supra*, 58 Cal.App.2d at p. 826.)

Before concluding with this topic, we address the SSI parties' attempt to avoid forfeiture by contending the Magco parties could not have satisfied the foundation for the exception. The fact-bound nature of that argument demonstrates why it should have been raised below. Nevertheless, we note the argument is not borne out by the SSI parties' citations to the record.

The SSI parties first assert the evidence established that the Magco parties created the job cost reports primarily to respond to "active disputes or negotiations," and that the job cost reports postdated the events recorded by "years." While the identified record citations show that the parties in 2012

were negotiating and trying to finalize their handshake deal, they do not tend to show the job cost reports were made in anticipation of a lawsuit or primarily for purposes of negotiating the parties' disputes over the alleged handshake deal, as the SSI parties suggest. Moreover, the identified record citations show the Magco parties provided Neville accountings for job costs in late 2012, but not when the job cost reports were created or the information in them recorded in relation to when costs were incurred.

The SSI parties also point to testimony from their expert, Michael Huhn, in support of their claim that the job cost reports were demonstrably so unreliable that the business records exception could not apply. Huhn testified he did not rely on the job cost reports, which he thought were unreliable, because numerous versions of the reports were created; sometimes different versions of the reports for a particular job showed different data for project managers and equipment used, and the reports appeared to have been prepared for purposes of showing billable items and profit. He also testified the metadata for one job cost report ("the LAX Terminal Six" job) showed the report was prepared in August 2012, even though the last cost in that report was dated May 2011, and other job cost reports were modified as late as January 2013. Not only is the foregoing testimony general and unspecific, but Huhn later acknowledged that the creation of different spreadsheets could possibly be explained by ongoing billing received as a job is completed, and that revisions to job cost records for completed jobs could occur after an accountant reviews records months after a job is completed. Ultimately, Huhn's testimony provides no basis for rejecting application of the business records exception.

Finally, the SSI parties claim the job cost reports, as a whole, were not sufficiently trustworthy because there was evidence that one job cost report

was created in 2015 and edited to increase costs for renting out the Delmag. Their record citations point us to a job cost report for a project designated "11-T100," and what appears to be two screenshots of spreadsheets showing costs for that project, marked with the same 2015 date but different "content created" times listed in their respective document property boxes. But the SSI parties fail to point us to evidence (and we could find none) that the 2015 date reflected in these screenshots actually represented the date the Magco parties created this particular job cost report, as opposed to something else, such as the "print date" which is what the Magco parties suggested and what Holly agreed this date was in later testimony. When asked about this particular job cost report, Holly testified she prepared it in 2013. Moreover, Holly was cross-examined as to whether the screenshots showed the job cost report was edited in 2015 to raise the rental rate of the Delmag, and her credibility and the weight of the evidence was a matter for the jury to assess. In any event, it is unclear why this detail about a single job cost report should be dispositive as to the trustworthiness of all the job cost reports such that the business records exception could not possibly apply to any of them.

In sum, we reject the SSI parties' various claims concerning the job cost reports.

2. Kahrs's Testimony About Contract and Ownership

The SSI parties contend the trial court erroneously admitted the opinion of Henry Kahrs, the Magco parties' expert, as to the occurrence of a sale and ownership of equipment. The SSI parties indicate this claim is relevant to the verdict on the SSI parties' conversion claims. It is also relevant to the declaratory relief claims concerning ownership of the disputed property.

(a) Additional Background

In their expert witness declaration, the Magco parties asserted Kahrs was a certified public accountant and forensic accountant. The declaration identified the general substance of his testimony as concerning all the amounts the Magco parties paid to the SSI parties between 2011 and 2013, profits and losses the Magco parties collected or incurred on TDP projects, and "any additional matters and expert opinions ascertained by his review of [the Magco parties'] accounting and other records."

In the midst of trial, the SSI parties expressed concern that the substance of Kahrs's prospective testimony would violate "discussions that it's not going to be about what is owed under the deal." Specifically, the SSI parties had problems with Kahrs testifying about "what happened on the deal," "who owns the equipment now," and his belief there is an enforceable contract. The court responded by saying: "Well, if there's any testimony regarding a contract, that's not going to be allowed because I've already ruled on that." The court also said Kahrs should not testify about "what the elements of the contract are." The court did not indicate it would limit Kahrs's testimony in any other way. Although the court indicated the parties had done fairly well by referring to the parties' "handshake deal" rather than a "contract," the court said it was considering admonishing the jury there was no contract because the word "contract" had still come up.

Kahrs testified at trial that Magco transferred a total of $400,000 to SSI in early April 2011. Given the date of the transfers and the fact there were no profits from jobs or other deals at the time, he opined the payments could only be explained as payments for purchasing SSI's equipment and Neville's technology. Later, the Magco parties asked Kahrs whether there were indications a transaction occurred. Kahrs replied that a transaction for

the sale of equipment and technology occurred, the equipment was worth $1,175,000, the patent was worth $350,000, and the equipment transferred ownership.

(b) Analysis

Noting the Magco parties did not designate Kahrs as an expert on the "subject of the existence of a sale, or on transfer of ownership," the SSI parties contend the trial court erroneously admitted his testimony on those topics. They also argue that Kahrs lacked expertise on these matters, and that his opinion about the ownership of the equipment was an inadmissible legal conclusion. We reject these contentions.

Parties are statutorily required to exchange information about certain expert witnesses via a declaration that includes "[a] brief narrative statement of the general substance of the testimony that the expert is expected to give." (§ 2034.260, subd. (c)(2).) "[A]n expert may be precluded from testifying at trial on a subject that was not described in his expert witness declaration. . . . This ensures that the opposing party has an opportunity to gather sufficient evidence for cross-examination and rebuttal." (*DePalma v. Rodriguez* (2007) 151 Cal.App.4th 159, 164–165.)

Section 2034.260, however, does not require disclosure of specific facts and opinions. (*Williams v. Volkswagenwerk Aktiengesellschaft.* (1986) 180 Cal.App.3d 1244, 1258.) For instance, in *Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, the plaintiff informed the defendants his expert "would testify 'to the medical care and treatment rendered to plaintiff as well as [his] diagnosis and prognosis on plaintiff's physical condition.' " (*Sprague*, at p. 1040.) Based on that narrative statement, *Sprague* determined the expert was properly permitted to testify on numerous topics including the expert's examination of the plaintiff at the request of a worker's compensation

insurer; his general diagnosis of disc disease; the meaning of medical terminology relevant to the plaintiff's treatment; his interpretation of other doctor's reports he reviewed to make his own diagnosis; and his responses to hypotheticals about what his diagnoses would be. (*Id*. at pp. 1040–1041.)

Here, the expert witness declaration stated Kahrs was a certified public accountant and forensic accountant who would testify about all payments Magco made to SSI between 2011 and 2013. The declaration also disclosed Kahrs would testify about Magco's profits and losses on TDP projects, and "any additional matters and expert opinions ascertained by his review of Magco's accounting and other records." That Kahrs traced payments Magco made to SSI and opined what they were for (i.e., his opinion that a sale occurred) did not go beyond the declaration's statement of "general substance." (§ 2034.260, subd. (c)(2).) There was no error in admitting Kahrs's opinion that a sale transpired.[10]

With regard to Kahrs's opinion about the transfer of ownership, we tend to agree it went beyond the Magco parties' designation. Nonetheless, it appears the SSI parties forfeited this claim by not clearly and specifically objecting to it below. (Evid. Code, § 353, subd. (a).)

Specifically, looking at the testimony to which the SSI parties actually refer, it is apparent the Magco parties did not ask Kahrs for his opinion about a "transfer of ownership." Rather, the Magco parties asked if there were indications *that a transaction occurred* and what Kahrs concluded in that

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[10] We reject the SSI parties' suggestion that the trial court retracted or revised its prior order that Kahrs would be precluded from testifying about the existence of a contract. The court indicated it would not allow Kahrs to testify about a "contract," but it clearly differentiated between the terms "contract" and "deal." In line with this, Kahrs testified about a sale or transaction involving SSI's assets, but he did not give an opinion regarding contract formation.

regard. It was to this question that the SSI parties objected, stating: "Calls for legal conclusion. Outside the scope of his testimony and his designation." After the court overruled that objection, Kahrs responded he thought a sale occurred, *and* there was a transfer of ownership. But the SSI parties did not object when Kahrs gave this latter opinion about the transfer of ownership, which appears to have been unsolicited. They also never objected on the ground that Kahrs lacked expertise about the sale or transfer of equipment (*People v. Dowl* (2013) 57 Cal.4th 1079, 1087–1088), or on the ground that his transfer-of-ownership opinion was an inadmissible legal conclusion. That being the case, these claims were forfeited.[11] (*People v. Harris* (1978) 85 Cal.App.3d 954, 957.)

Even if not forfeited, our review of the trial record leads us to conclude the admission of Kahrs's transfer-of-ownership testimony was not reversible error.

The record contains a considerable amount of evidence presented on the topic of ownership of the equipment. For example, Michael testified at length about the price agreed upon, the amounts and liens he paid, his obtaining the equipment, paying insurance and property taxes on the equipment, paying

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[11] We disagree with the SSI parties' contention that they preserved the issue for appeal by raising concerns about Kahrs's testimony prior to his taking the stand. (See generally *Morris*, *supra*, 53 Cal.3d at pp. 189–190.) Although the cited portions of the record show the SSI parties did express a problem with Kahrs testifying about the transfer of ownership, they did so on the ground that such opinion would be "in violation of our discussions it's not going to be about what is owed under the deal"—*not on the ground that it was outside the scope of his designation*. The SSI parties also complained that Kahrs was being "pa[id] to add up numbers" and that this was not the proper subject of expert opinion and cumulative. But at no point did they object to Kahrs's lack of expertise or to his opinion regarding ownership being a legal conclusion.

for repairs, and storing the drill rig. Michael also testified that the SSI parties never complained about the amounts paid or asked for the equipment back. Holly testified the payments the Magco parties made were to buy the equipment and patent. Holly explained that, for the equipment in dispute, there is nothing like a car's "pink slip" accompanying it. The Magco parties introduced into evidence a bill of sale indicating the SSI parties sold them the Cat excavator. Michael testified they had a bill of sale for this particular piece of equipment because they financed some portion of it and their lender required a bill of sale. Stephen Wilson, a witness who was involved in selling TDP tips with both Neville and Michael, testified that around late 2011, Neville told him that he sold SSI's assets to Michael. And notably, prior to the testimony specifically complained of by the SSI parties, Kahrs had already testified without objection that the equipment transferred ownership from the SSI parties to the Magco parties on March 31, 2011.

The SSI parties complain Kahrs was an "expert" who gave an opinion about transfer of ownership while their expert did not. While the SSI parties' expert, Michael Huhn, may not have explicitly testified ownership did not transfer, his testimony clearly suggested MCM did not purchase the equipment. Huhn testified MCM's general ledger did not reflect the equipment purchases other than the Cat excavator, and he also testified that it is common practice to list equipment purchased in one's general ledger.

Considering the evidence presented about ownership of the equipment, it is not reasonably probable a more favorable outcome on SSI's defense to the Magco parties' cause of action for conversion or the request for declaratory relief as to the ownership of the equipment would have been different but for the admission of Kahrs's opinion that ownership transferred. (Evid. Code, § 353, subd. (b); *People v. Richardson* (2008) 43 Cal.4th 959, 1001.)

In sum, the claimed errors are without merit.

3. Kahrs's Opinions on Revenues and Expenses

The SSI parties contend that Kahrs's testimony regarding project expenses, revenues, amounts paid to SSI, related calculations, and two of Kahrs's schedules lacked foundation and were based on the Magco parties' hearsay job cost reports and speculation. They allege this evidence impacted the unjust enrichment award and the verdict as to the conversion claims. The Magco parties respond by arguing the SSI parties never made the requisite objections and therefore failed to preserve this contention for appeal. They point out the SSI parties opening brief is devoid of any record citations showing the necessary objections were made.

As discussed, parties must make clear and specific objections to preserve claims for appeal. (Evid. Code, § 353, subd. (a); *Dorsey*, *supra*, 43 Cal.App.3d at p. 960.) Here, while the SSI parties claim they preserved their objection, their record citations do not support their position. More specifically, they cite to several motions in limine, but fail to show these motions preserved the issue for appeal. (*Morris*, *supra*, 53 Cal.3d at p. 190.) The SSI parties also argue an objection would have been futile. This, however, is conclusory and unsupported by record citations. (*People v. Thomas* (2012) 54 Cal.4th 908, 939.)

In sum, the SSI parties failed to preserve the claimed error for appellate review.

4. Kahrs's Other Opinions

The SSI parties list numerous other assertions Kahrs made that they argue were "unfounded." The SSI parties, however, provide record citations without identifying the statements they are referring to specifically and without tendering a developed argument about any resulting prejudice. Simply put, their general and conclusory allegations of prejudicial error are

inadequate. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784–785 (*Badie*); *Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 963 (*Century Surety Co.*).)

5. Exclusion of Kahrs

The SSI parties contend the trial court abused its discretion in refusing to exclude Kahrs under section 2034.300, after the Magco parties untimely designated him as an expert. We reject the argument.

(a) Additional Facts

In short, the relevant facts are these: The Magco parties made a demand for the exchange of expert witnesses on December 12, 2017. Expert disclosures were due January 2, 2018. (§ 2034.230, subd. (b).) On January 5, 2018, counsel for the Magco parties told counsel for the SSI parties they did not timely designate their expert due to a mistake or clerical error. The Magco parties did not designate their expert until January 11, 2018.

The parties have different recollections regarding what happened after the Magco parties failed to timely disclose their expert. The SSI parties claimed they did not agree to a late designation and told counsel for the Magco parties to immediately provide a designation plus documentation showing good faith mistake. For their part, the Magco parties understood counsel for the SSI parties to say that the delay would be excused without need for a motion under section 2034.710, if the designation were served "as soon as possible." Counsel for the Magco parties explained the days that passed before they submitted the expert designation—i.e., from January 5 to January 11, 2018—were due to "excusable neglect" because Kahrs's schedule had become erratic and it appeared the Magco parties might need to find another expert in the "Alameda area."

After designating Kahrs, the Magco parties claimed Kahrs was unavailable for a deposition originally scheduled on February 2, 2018, causing the SSI parties to depose him on February 5, 2018. But during his deposition, Kahrs testified he had been available on February 2, 2018.

The SSI parties filed a motion in limine to exclude Kahrs due to his untimely designation. The trial court declined to exclude Kahrs, but ordered the Magco parties to cover the cost of a second deposition so the SSI parties could question Kahrs about supplemental opinions he provided after his first deposition.

(b) Analysis

Section 2034.300 empowers a trial court to exclude the expert opinion of any witness offered by a party who has *unreasonably* failed to list that witness as an expert as required by section 2034.260. (§ 2034.300, subd. (a).) "Failure to comply with expert designation rules may be found to be 'unreasonable' when a party's conduct gives the appearance of gamesmanship." (*Staub v. Kiley* (2014) 226 Cal.App.4th 1437, 1447 (*Staub*).) Exclusion of evidence is justified where the record shows a party engaged in "a comprehensive attempt to thwart the opposition from legitimate and necessary discovery." (*Zellerino v. Brown* (1991) 235 Cal.App.3d 1097, 1117 (*Zellerino*).) We review the court's ruling on the section 2034.300 motion to exclude and its reasonableness determination for abuse of discretion. (*Staub*, at p. 1445.)

Staub is instructive on this matter. In *Staub*, the plaintiffs designated their expert about two weeks late. (*Staub*, *supra*, 226 Cal.App.4th at p. 1442.) The plaintiffs' attorney averred he decided to change experts about a month before the designation was due, but then had difficulty reaching the new expert during the December holidays. (*Id.* at p. 1447.) Shortly after

designating the expert, the plaintiffs promptly offered to make the expert available for deposition. (*Ibid.*) As relevant here, the Court of Appeal concluded the record did not support the trial court's "determination that plaintiffs so unreasonably failed to timely disclose their experts that exclusion of all expert testimony was warranted." (*Ibid.*) The court explained: "Neither plaintiffs nor their counsel engaged in actions that can be characterized as gamesmanship, nor did they engage in a 'comprehensive attempt to thwart the opposition from legitimate and necessary discovery,' justifying exclusion of evidence. . . . While counsel's late arrangements for experts are not evidence of an ideal practice, they do not show an attempt to thwart defendants' discovery." (*Ibid.*) The court noted its conclusion was "bolstered by the fact that the order excluding plaintiffs' experts from testifying at trial was in effect a terminating sanction," as it resulted in the grant of a nonsuit. (*Id.* at pp. 1443–1444, 1448.)

In the case at hand, the parties had competing versions of why Kahrs was not designated until January 11, 2018, and the trial court was entitled to credit the Magco parties' explanation. Furthermore, the SSI parties were able to depose Kahrs on February 5, 2018, which was within the 15-day cutoff period for expert depositions. (§ 2024.030.) Thus, while the conduct of counsel for the Magco parties was not ideal, the record supports the trial court's evident conclusion that their delay in designating Kahrs was not unreasonable and did not amount to "gamesmanship" (*Staub*, *supra*, 226 Cal.App.4th at p. 1447) or a "comprehensive attempt to thwart the opposition from legitimate and necessary discovery" (*Zellerino*, *supra*, 235 Cal.App.3d at p. 1117).

The SSI parties allege the Magco parties misrepresented that Kahrs was unavailable for deposition on February 2, 2018 and strategically delayed

his deposition to February 5, 2018 when he was available on February 2. The short answer to this is that the trial court could reasonably decide to the contrary.

Finally, the SSI parties' reliance on *Fairfax v. Lords* (2006) 138 Cal.App.4th 1019 (*Fairfax*) is misplaced. In *Fairfax*, the plaintiff timely designated an expert but the defendant did not. (138 Cal.App.4th at p. 1022.) Significantly, the defense attorney admitted he delayed his expert designation until after seeing the plaintiff's designation because he believed "requiring defendants, who have no burden of proof, to spend money retaining experts on issues which plaintiff might choose not to pursue is a hardship." (*Id.* at p. 1024.) The trial court denied exclusion of the defense's designated experts, but the Court of Appeal reversed. (*Id.* at pp. 1025, 1028.) Among other things, the Court of Appeal concluded the defense's strategic reason for not timely designating its expert was inconsistent with the statutory requirement of a simultaneous exchange. (*Id.* at pp. 1026–1027.)

In contrast to the situation in *Fairfax*, the Magco parties' delay in designating Kahrs was nine days—not three weeks as in *Fairfax*—and there was no evidence the delay was intended to work some sort of strategic advantage. The trial court did not abuse its discretion in declining to exclude Kahrs.

6. Exclusion of Rebuttal and Impeachment Evidence

The SSI parties claim the trial court wrongly excluded rebuttal and impeachment evidence regarding project expenses. More specifically, they claim the Magco parties denied at trial that SSI incurred any project expenses other than payroll. Magco's own reimbursement lists indicated this was false, but Holly denied creating the reimbursement lists or knowing who did. So, when the SSI parties tried to impeach Holly with a screenshot showing Holly was the "author" of one of the reimbursement lists (exhibit

number 568), the court disallowed them from even showing her the document. The SSI parties allege this was an abuse of discretion that impacted the unjust enrichment award. We conclude there was no error.

Local Rule 3.35(b) of the Superior Court of Alameda County requires all trial exhibits, other than those to be used for impeachment or rebuttal, to be indexed and exchanged between counsel before trial. That rule specifically states: "Failure to disclose or exchange a copy of any exhibit may result in its exclusion at trial." (Super. Ct. Alameda County, Local Rules, rule 3.35(b).)

Here, the portions of the transcript cited by the SSI parties show that Holly testified she did not create the reimbursement lists, but was familiar with them and perhaps made edits to them. Thereafter, the SSI parties tried to show Holly exhibit 568 and the Magco parties objected they had not seen the exhibit before and it was not for impeachment. When the trial court asked what the exhibit was for, the SSI parties replied: "Shows that she was involved in reviewing all of these items. She's testified that this is a spreadsheet that she's the author of and that she was working through these things." The court then sustained the Magco parties' objection, stating the SSI parties should have provided the document earlier. We see no abuse of discretion. The SSI parties did not argue that the exhibit was for rebuttal or impeachment, nor that they disclosed the exhibit prior to trial. As such, they gave the court no reason to believe its ruling was not in line with the aforementioned local rule.

Relatedly, the SSI parties allege the court wrongly disallowed them from asking their expert Huhn to rebut and impeach Kahrs's schedules, which assumed SSI did not incur expenses other than for labor. Whether or not this was an abuse of discretion, we reject the claim because the SSI parties fail to demonstrate the perceived error was prejudicial. (Cal. Const.,

art. VI, § 13.) The SSI parties fail to explain what evidence of SSI's expenses was presented at trial, for example, in their case in chief.

Next, the SSI parties claim the trial court wrongly excluded rebuttal and impeachment evidence regarding Magco's and MCM's internal lease agreement. More specifically, at trial, the SSI parties sought to admit exhibit number 570, which was an exhibit to an equipment lease between Magco and MCM (Magco's holding company) showing the monthly amounts MCM charged Magco for leasing equipment and equipment purchases. In arguing the trial court erroneously excluded this exhibit, the SSI parties contend the exhibit's failure to list SSI's drill rig and forklift would have undermined the Magco parties' unjust enrichment cause of action by rebutting their claimed ownership of the drill rig and forklift, and their claimed expenses for renting out that equipment.

No prejudicial error appears. Even assuming it was error to exclude the exhibit, the SSI parties fail to establish its exclusion resulted in a miscarriage of justice. (Evid. Code, § 354.) The alleged import of the exhibit to the issue of ownership was to show that MCM recorded what rent was charged for and its equipment purchases, and that MCM recorded purchasing SSI's excavator but not its drill rig or forklift. But the exhibit was merely cumulative of Holly's explicit testimony to such facts.

Last, the SSI parties argue the court erred in disallowing them from showing Holly exhibit number 565, described as a series of vendor reports from Magco, to impeach Kahrs. According to the SSI parties, this exhibit "showed a missing equipment appraisal, no taxes paid related to the [drill rig], lease payments inconsistent with the leasing of the [drill rig], and self-dealing." The SSI parties, however, tender no developed argument about

prejudice, so we decline to consider the claim. (*Century Surety Co.*, *supra*, 139 Cal.App.4th at p. 963.)

C. Jury Instructions

The trial court instructed the jury with CACI No. 2100 for the SSI parties' causes of action for conversion. The SSI parties now contend the court erred by failing to further instruct about contracts, sales, the transfer of property, and its prior ruling that no enforceable contract for the sale of the equipment was reached between Neville and Michael. The SSI parties claim the court prejudicially erred in refusing their proposed special instructions.

Initially, we note the SSI parties do not clearly identify which of their proposed instructions this claim concerns. That said, the Magco parties address three special instructions in their appellate brief: instructions labeled "S5" and "S10/5007," and additional language to CACI No. 2100. In their reply brief, the SSI parties do not indicate its claim concerns anything other than these three instructions. Accordingly, we will construe the SSI parties' argument as pertaining to the refusal to give these three proposed instructions.

The SSI parties' proposed "S5" instruction, titled "No Sale," would have told the jury: the Magco parties claimed they are not liable for conversion because MCM obtained title to property via sale; the court already determined the Magco parties and SSI parties "did not enter into a contract for the sale of . . . Neville or [SSI's] assets or patent"; and title to equipment or the patent did not pass based on the handshake deal or draft summary agreements discussed at trial. Similarly, their proposed "S10/5007" instruction would have told the jury that, as to testimony regarding a "deal" or "draft summary agreement[s]," the court had already determined "the parties did not reach an enforceable agreement for the sale of [SSI] and . . .

Neville's assets, including their equipment or the TDP patent[] to the Plaintiffs." Boiled down, these two proposals would have instructed the jury that the parties *never* reached an "enforceable agreement" or contract for the sale of SSI's equipment or Neville's patent. The SSI parties argue the court should have given these instructions because the court had dismissed all the contract claims and said it had already ruled there was no contract. We do not agree.

"Courts are not [required] to reframe erroneous or incomplete instructions and parties cannot complain that an instruction of that character has not been given." (*Bertolozzi v. Progressive Concrete Co.* (1949) 95 Cal.App.2d 332, 337–338 (*Bertolozzi*).) We review claims of instructional error de novo. (*Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72, 82.)

The dismissal of all contract claims occurred after the trial court sustained the demurrer to the Magco parties' cause of action for breach of oral contract that the parties allegedly entered into when they met at Magco's yard in February 2011 and shook hands on a purported deal. The court sustained the demurrer to this cause of action because the written draft agreement attached to the Magco complaint contradicted the complaint's allegation that the parties agreed on definite terms to the three oral contracts. Thereafter, before trial, the court said its ruling on the demurrer was that there was no agreement or contract. The court echoed this statement during trial.

As generally phrased as they might be, however, these statements cannot reasonably be understood as the court's determination that there was *never any* agreement between the parties for the sale of equipment. Such an interpretation is unjustifiably broad and would have conflicted with the SSI

parties' own admission that it sold its Cat excavator to the Magco parties, and also with the court's declaratory relief judgment as to ownership of the equipment. Rather, as previously suggested, the court's statements are reasonably understood as reflecting its determination that no enforceable agreement or contract formed during the parties' handshake dealings in February 2011. Thus, the requested instructions were overstated and inaccurate, and the court could properly refuse them. (*Bertolozzi*, *supra*, 95 Cal.App.2d at pp. 337–338.)

In their reply brief, the SSI parties contend: "Even if there was some minor error in wording, the court had a duty to instruct: 'When a proposed instruction addresses an issue that is crucial to a fair presentation of the case to the jury, the trial court has the obligation to give an appropriate instruction.' " They continue: "Because the court dismissed all contract claims and excluded instructions related to contract formation [citation], it was crucial to clarify to the jury that the issue of whether there was a contract for sale had already been decided." (Italics omitted.) We reject this contention for the reasons already stated.

The last instruction at issue is the proposed addition of language to CACI No. 2100 that "[w]rongful intent is not required to prove conversion. Mistake or good faith is not a defense to a claim of conversion." The Magco parties assert the SSI parties initially proposed this instruction because the trial court mistakenly modified CACI No. 2100, such that the jury would be told it had to find one of the Magco parties "intentionally *and* substantially interfered" with SSI's or Neville's use or possession of property, rather than "intentionally *or* substantially interfered" as CACI No. 2100 would normally be worded. (Italics added.) According to the Magco parties, after the court

recognized and corrected this, the SSI parties' proposed language regarding wrongful intent became unnecessary.

The Magco parties' argument is sound. The SSI parties contend the court should have given the requested instruction because it would have corrected an alleged mischaracterization the Magco parties made during closing argument that " '[c]onversion essentially . . . it's our civil claim for theft.' " But the SSI parties did not object to counsel's alleged mischaracterization during closing argument, nor did they re-request the instruction to address it. (*Whitfield v. Roth* (1974) 10 Cal.3d 874, 891–892.) Further, we see no prejudice in light of the fact the jury was correctly instructed as to conversion. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1250.)

D. Ownership of the Delmag Drill Rig

The SSI parties argue that the jury and the court should have declared SSI owner of the drill rig. Their first argument on this point is as follows: "Magco claimed ownership of equipment through a sale. Under the law of sales or at common law, title passes *by agreement*, and the goods must be identified *to a contract*. (4 Witkin, Summary 11th Sales (2017), § 126; see, e.g., [*Virtanen v. O'Connell* (2006) 140 Cal.App.4th 688,] 707–709; *Cardinell v. Bennett* (1877) 52 Cal. 476, 476; Civ. Code, § 1040.) [¶] As found by the court, the essential element of a contract, or agreement, to transfer title was missing. For this reason alone, the judgment should be reversed." (Fn. omitted.) We reject this.

The four sentences quoted here are the beginning and end of the argument in the opening brief. The SSI parties set forth no record citations, and aside from the aforementioned quote, make no effort to identify or summarize the applicable law or our standard of review. The cited

authorities, standing by themselves, are not helpful. We thus reject the claim as undeveloped and forfeited. (*Badie*, *supra*, 67 Cal.App.4th at pp. 784–785.)

Next, the SSI parties argue the jury and the court should have declared SSI the owner of the drill rig because a transfer vests ownership only upon delivery, delivery must be done with intent to presently pass title, and there was no substantial evidence SSI intended to pass title to Magco upon delivery of the equipment.

When assessing a challenged finding of fact on appeal, we apply the substantial evidence standard of review. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) We presume the record contains evidence to sustain every finding of fact. (*Ibid.*) The appellant carries the burden to demonstrate that it does not. (*Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1658.) "In furtherance of its burden, the appellant has the duty to fairly summarize *all of the facts in the light most favorable to the judgment*," not merely their own evidence. (*Ibid.*, italics added; *Foreman & Clark Corp.*, *supra,* at p. 881.) " 'It is incumbent upon appellants to state fully, with transcript references, the evidence which is claimed to be insufficient to support the findings.' " (*In re Marriage of Fink* (1979) 25 Cal.3d 877, 887.) Unless this is done, the asserted error is deemed waived. (*Foreman & Clark Corp.*, *supra,* at p. 881.) *Furthermore*, " ' "[a]rguments should be tailored according to the applicable standard of appellate review." [Citation.] Failure to acknowledge the proper scope of review is a concession of a lack of merit.' " (*Ewald v. Nationstar Mortgage, LLC* (2017) 13 Cal.App.5th 947, 948.)

Here, the SSI parties acknowledge the standard of review only with passing references to there being no substantial evidence or there being insufficient evidence. More importantly, the SSI parties fail to properly tailor

their argument to the standard of review by discussing and providing record citations to *unfavorable* evidence. They argue the Magco parties failed to identify any evidence that SSI intended to deliver title to MCM, but this ignores their own burden to demonstrate error.

In the midst of their argument about substantial evidence, the SSI parties further contend the court wrongly denied their motion to compel answers to several special interrogatories regarding expenses related to SSI's equipment. This contention is improperly raised. If the SSI parties believed the court made an erroneous discovery ruling, they were required to present the claim under a separate and specific heading, and support the claim with argument and authority. (*Opdyk v. California Horse Racing Board* (1995) 34 Cal.App.4th 1826, 1830, fn. 4 (*Opdyk*).) They did not, and the claim is forfeited.

E. Discovery

The SSI parties contend the trial court wrongly denied their motions to compel discovery of (1) Magco's QuickBooks entries for the years 2014 to 2015; (2) Magco's Corecon records[12]; and (3) Magco's original job cost files. The SSI parties claim all of these alleged errors likely impacted the jury's resolution of the unjust enrichment claims.

1. Additional Background

The SSI parties requested Magco and MCM produce: "All original, unaltered, electronic Quickbooks files in its possession, custody, or control relating or referring to . . . to screw down pile technology or TDP projects or TDP technology or TDP tips or the drill rig or that relate or refer to the work [the Magco parties] performed for [the SSI parties] as alleged in the

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12 Corecon is accounting software for construction companies.

complaint. (Capitalization omitted.) The SSI parties made the same request of the Magco parties' Corecon files.

The Magco parties produced QuickBooks entries from 2011 to 2013 but objected to producing QuickBooks records from 2014 to 2015 or any Corecon files. The court denied the SSI parties' the motion to compel the later QuickBooks records, finding the request overbroad and unduly burdensome. The court also stated: "[The SSI parties'] suggestion during the hearing that [the Magco parties] may have received retention payments after 2013 for work performed by the parties prior to the filing of the lawsuit in March 2013 has no support in the record." For the same reasons, the court denied production of Corecon files. The court also determined, based on representations by the Magco parties, that the Corecon files included the same information as the QuickBooks records, so it denied production of the requested Corecon files as duplicative.

In a later set of document requests, the SSI parties requested that the Magco parties produce the " 'final 'job cost' spreadsheet file for each screw down pile technology [p]roject,' " and they moved to compel such production in October 2016. (Capitalization omitted.) According to the SSI parties, the requested documents were "at the heart of the dispute over how much profits were earned on each project and how much money Magco owes to [SSI] and Steve Neville." While the motion to compel was pending, in December 2016, the trial court dismissed several causes of action from the SSI parties' original cross-complaint, finding they presented a substantial question of federal patent law that deprived the court of subject matter jurisdiction. Then, the court denied the SSI parties' motion to compel in March 2017, stating their request sought documents relating to Neville's patent. The SSI parties filed their first amended cross-complaint in April 2017.

2. Discussion

The SSI parties first contend the trial court wrongly denied their motion to compel Magco's QuickBooks records beyond 2013 based on the Magco parties' misrepresentations that no retention payments were made after 2013. They allege trial testimony evidenced that the Magco parties received payments for joint projects in 2014 or 2015, that they had one change order on a joint project executed in in October 2013, and that they were closing out another joint project in April 2014.

We review a court's decision on a motion to compel discovery for abuse of discretion. (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733.) " 'Management of discovery generally lies within the sound discretion of the trial court.' [Citation.] 'Where there is a basis for the trial court's ruling and it is supported by the evidence, a reviewing court will not substitute its opinion for that of the trial court. [Citation.] The trial court's determination will be set aside only when it has been demonstrated that there was "no legal justification" for the order granting or denying the discovery in question.' " (*Maldonado v. Superior Court* (2002) 94 Cal.App.4th 1390, 1396–1397.)

Here, the claim fails because it relies on trial evidence unknown to the court at the time of its decision. (*Reese v. Wal-Mart Stores, Inc.* (1999) 73 Cal.App.4th 1225, 1237; see, e.g., *People v. Ybarra* (2016) 245 Cal.App.4th 1420, 1433; *Brainard v. Cotner* (1976) 59 Cal.App.3d 790, 796.) The SSI parties cite no authority indicating we may engage in a post hoc analysis of the reasonableness of the court's decision and find an abuse of discretion in hindsight based on later occurrences at trial.

Next, the SSI parties contend the court erred in denying their motion to compel Magco's Corecon records based on the Magco parties'

misrepresentation that the Corecon records were duplicative and less complete than its QuickBooks records. In support, the SSI parties point to the trial testimony of Kahrs, the Magco parties' expert, who said that "QuickBooks never had the data in it to be adjusted by job." We reject this for the same reasons we reject the claim above.

Finally, the SSI parties claim the trial court wrongly denied their motion to compel the Magco parties' production of their " 'final 'job cost' spreadsheet file for each SCREW DOWN PILE TECHNOLOGY Project' " on the ground that the request sought documents relating to Neville's patent.

The Magco parties respond there was no abuse of discretion. Providing context for the court's decision, the Magco parties explain that before ruling on the motion to compel, the court had dismissed the patent-related causes of action in the SSI parties' original cross-complaint. Thus, they argue, the court acted within its discretion denying the motion to compel production of documents related to the patent. The SSI parties do not deny that the denial of the motion to compel was connected to the dismissal of the causes of action in the original cross-complaint. Instead, they respond that even without their own live causes of action, they were still entitled to the discovery because it was pertinent to their defenses to the Magco parties' claims for unjust enrichment.

The SSI parties' argument appears sound (§ 2017.010), but they fail to affirmatively demonstrate that the perceived error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; *Property Reserve, Inc. v. Superior Court* (2016) 6 Cal.App.5th 1007, 1020.) " '[A] "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in

the absence of the error.' [Citation.] 'We have made clear that a 'probability' in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*.' " (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800 (*Cassim*).)

First of all, the SSI parties do not deny the court's denial of the motion to compel was connected to the dismissal of the causes of action in the original cross-complaint. Yet there is no evidence in the record that they renewed their request for the documents after filing their amended cross-complaint, and they fail to explain why they did not or could not do so.

Furthermore, the SSI parties claim "[w]ithout the original files (and the metadata) from Corecon and the Magco special reports, [the SSI parties] could not definitively show when the documents were created, who created them, and how they were edited over time. [Citation.] With original documents, [the SSI parties] could have demonstrated each report was inadmissible and unreliable." (Italics omitted.) Conspicuously absent from this argument are any record citations. Ultimately, it appears speculative whether these original electronic documents or metadata even exist and whether they could be used to attack the Magco parties' job cost reports. At best, the SSI parties' claim raises a spectre—an abstract possibility of prejudice—which is insufficient. (*Cassim*, *supra*, 33 Cal.4th at p. 800.)

The claims are denied.

F. Substantial Evidence Supporting the Unjust Enrichment Award

The SSI parties challenge the sufficiency of the evidence supporting the $1,307,883 in damages that the jury awarded to the Magco parties for their unjust enrichment claim. This contention rests on their claims that the trial court should not have admitted the Magco parties' hearsay reports and Kahrs's testimony "based on conclusions or assumptions not supported by

evidence in the record." Because we have rejected those claims, this argument is unavailing.

Next, the SSI parties argue that, even assuming the job cost reports were admissible, there still is no substantial evidence supporting the unjust enrichment award. Specifically, even though there was evidence that the Magco parties paid the SSI parties a total of $1,673,203.44, the jury should have deducted various amounts from that total. This misconstrues the standard of review and would have us reweigh evidence. (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 398.)

The claim is denied.

G. Double Recovery

Finally, the SSI parties argue the jury's unjust enrichment award and the declaratory relief granted by the trial court permit double recovery in two respects. We address these claims in turn.

First, the SSI parties contend that because the parties told the jury to assume neither the equipment nor the patent was transferred, the unjust enrichment award to the Magco parties and the trial court's determination that the Magco parties owned the equipment constitutes double recovery. We are unpersuaded.

"[A plaintiff] is not entitled to more than a single recovery for each distinct item of compensable damage supported by the evidence. [Citation.] Double or duplicative recovery for the same items of damage amounts to overcompensation and is therefore prohibited." (*Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1158–1159.) "In contrast, where separate items of compensable damage are shown by distinct and independent evidence, the plaintiff is entitled to recover the entire amount of his damages, whether that amount is expressed by the jury in a single verdict or multiple verdicts

referring to different claims or legal theories." (*Id.* at p. 1159.) In examining these claims, we bear in mind the general principle that "[a] judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 (*Denham*).)

Here, during closing arguments, the Magco parties told the jury that in determining their fraud and unjust enrichment claims, they should assume that neither the equipment nor the patent transferred. Thus, it is plausible that the jury's award to the Magco parties includes amounts the Magco parties paid to the SSI parties for the equipment. But, it is equally plausible that after the jury rejected the SSI parties' conversion claim by finding that SSI did not own the equipment, it then resolved the SSI parties' unjust enrichment claim by awarding the SSI parties value for the equipment. Indeed, during closing arguments, the SSI parties urged the jury to award them damages for the value of the equipment. As stated, we must assume the judgment is correct and indulge all presumptions in its favor. (*Denham*, *supra*, 2 Cal.3d at p. 564.) Here, the SSI parties fail to affirmatively show the jury award for the Magco parties' unjust enrichment claim and the court declaring the Magco parties the owners of the equipment amounted to improper double recovery.

Lastly, the SSI parties claim that the Magco parties' unjust enrichment award included the $58,851 that Michael paid towards the SSI parties' patent attorney fees, but the court ordered the SSI parties to pay that same amount to the Magco parties as part of its declaratory relief judgment.[13] In

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[13] In making this argument, the SSI parties also assert the $58,000 award was improper because it was not within the scope of the pleadings and

support, the SSI parties assert that at trial they stipulated to the amounts the Magco parties paid to Neville's patent attorney, that the SSI parties included that amount in its own calculations during closing argument, and that the SSI parties told the jury the Magco parties should get credit for things they paid for.

The Magco parties respond "there is no way of conclusively determining from the record on appeal that the $1,307,833 damage award the Magco Parties received from the jury included the $58,851 for patent fees the trial court ordered the [SSI] Parties to pay to the Magco Parties as part of the declaratory relief." They note the jury "awarded the Magco Parties nearly $600,000 less than the low number in the range of damages the Magco Parties asked for. So a double recovery does not necessarily or automatically result from the trial court's determination that the [SSI] Parties must pay the Magco Parties an additional $58,851 on top of the $1,307,833 in [unjust enrichment] damages the jury awarded the Magco Parties."

Indeed, there is no way of knowing if the jury's award to the Magco Parties included the $58,851 for patent fees that the court awarded in its declaratory relief judgment. The special verdict forms do not specify what exactly the unjust enrichment awards are for. The SSI parties do not contend that this is a situation where the record is devoid of a factual basis for the jury's award without the $58,851 for patent fees at issue. (See, e.g., *Walker v. Signal Companies, Inc.* (1978) 84 Cal.App.3d 982, 995–996 [finding impermissible double recovery after undertaking a search of the record for a factual basis for distinct awards of damages].) We must presume a judgment

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the Magco parties did not request it but the court awarded it sua sponte. This is argued without citation to authority and is not under a proper heading and so we decline to consider it. (*Opdyk, supra*, 34 Cal.App.4th at p. 1830, fn. 4.)

is correct and indulge "[a]ll intendments and presumptions . . . to support it on matters as to which the record is silent." (*Denham*, *supra*, 2 Cal.3d at p. 564.) Because the SSI parties have not affirmatively shown error, we reject this claim.

DISPOSITION

The judgment is reversed in part. Because the second, third, eighth, and ninth causes of action in the SSI cross-complaint were improperly dismissed, we reverse the judgment and remand the matter for further proceedings consistent with this opinion. The judgment is affirmed in all other respects, including the unjust enrichment awards and the declaratory relief granted to the parties. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278.)

FUJISAKI, J.

We concur.

SIGGINS, P.J.

JACKSON, J.

(A155907)